(4)

No. 10-717

Supreme Court, U.S.
FILED
MAY 31 2011
OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

MICCOSUKEE TRIBE OF INDIANS OF FLORIDA,

Petitioner,

v.

KRAUS-ANDERSON CONSTRUCTION COMPANY,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

PETITIONER'S SUPPLEMENTAL BRIEF IN RESPONSE TO BRIEF FOR THE UNITED STATES AS *AMICUS CURIAE*

SONIA ESCOBIO O'DONNELL
Counsel of Record
JAMES EDWIN KIRTLEY, JR.
LARA O'DONNELL GRILLO
JORDEN BURT LLP
777 Brickell Avenue
Suite 500
Miami, Florida 33131
(305) 371-2600
seo@jordenusa.com

Counsel for the Petitioner Miccosukee Tribe of Indians

236336

COUNSEL PRESS
(800) 274-3321 • (800) 359-6859

QUESTIONS PRESENTED

Whether an action to obtain recognition and enforcement of an Indian tribal court judgment presents a federal question under 28 U.S.C. § 1331, based on the federal common law and the federal character of Indian law.

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
TABLE OF CONTENTS	ii
TABLE OF CITED AUTHORITIES	iii
I. The United States Is Incorrect That No Conflict Exists Among The Circuits Regarding The Question Presented	1
II. The United States Is Incorrect That No Conflict Exists Between The Eleventh Circuit's Opinion And Supreme Court Precedent	5
CONCLUSION	12

TABLE OF CITED AUTHORITIES

Page

CASES

Bank of America, N.A. v. Bills,
2008 WL 682399 (D. Nev. Mar. 6, 2008),
aff'd 400 F. App'x 159 (9th Cir. 2010) 4

Bird v. Glacier Electric Coop., Inc.,
255 F.3d 1136 (9th Cir. 2001) 4

Cherokee Nation v. State of Georgia,
30 U.S. (5 Pet.) 1 (1831)..... 9, 10

Citizens Savings Bank & Trust Co. v. Wellman,
2010 WL 2710414 (D. Mont. July 6, 2010)..... 4

Citronelle-Mobile Gathering, Inc. v. Watkins,
943 F.2d 1297 (11th Cir. 1991) 6

Fleischmann Distilling Corp. v. Maier Brewing Co.,
386 U.S. 714 (1967) 2

Ford Motor Credit Co. v. Milhollin,
444 U.S. 555 (1980) 2

Grable & Sons Metal Products, Inc. v. Darue Engineering & Manufacturing,
545 U.S. 308 (2005) 11

MacArthur v. San Juan County,
391 F. Supp. 2d 895 (D. Utah 2005) 2

Cited Authorities

	Page
MacArthur v. San Juan County, 497 F.3d 1057 (10th Cir. 2007)	2
Merrion v. Jicarilla Apache Tribe, 455 U.S. 130 (1982)	7
Miccosukee Tribe of Indians of Florida v. Kraus-Anderson Construction Co., 607 F.3d 1268 (11th Cir. 2010)	1
National Association of Greeting Card Publishers v. U.S.P.S., 462 U.S. 810 (1983)	2
National Farmers Union Insurance Companies v. Crow Tribe of Indians, 471 U.S. 845 (1985)	*passim*
NLRB v. Pueblo of San Juan, 30 F. Supp. 2d 1348 (D.N.M. 1998)	7, 9
NLRB v. Pueblo San Juan, 276 F.3d 1186 (10th Cir. 2001)	7
Reed v. Helena Abstract & Title Co., 200 F. App'x 641 (9th Cir. 2006)	4
Ruhrgas AG v. Marathon Oil Co., 526 U.S. 574 (1999)	3

Cited Authorities

Page

Shillitani v. United States,
384 U.S. 364 (1966) 6

United States v. Cal. E. Line,
348 U.S. 351 (1955)..... 3

Vacco v. Harrah's Operating Co., Inc.,
661 F. Supp. 2d 186 (N.D.N.Y. 2009) 4

Wilson v. Marchington,
127 F.3d 805 (9th Cir. 1997) 1, 2, 3

STATUTES

U.S. Const. amend. X 9

U.S. Const. amend. XI 9

OTHER AUTHORITIES

34 U.S. Op. Atty. Gen. 439, 442 9

Petitioner Miccosukee Tribe of Indians of Florida ("Tribe") respectfully submits this Supplemental Brief in response to the Brief for the United States as Amicus Curiae.

I. The United States Is Incorrect That No Conflict Exists Among The Circuits Regarding The Question Presented

In *Wilson v. Marchington*, 127 F.3d 805 (9th Cir. 1997), the Ninth Circuit decided "whether, and under what circumstances, a tribal court tort judgment is entitled to recognition in the United States Courts." *Id.* at 807. In this case, the Eleventh Circuit held that "[a] suit to domesticate a tribal judgment does not state a claim under federal law, whether statutory or common law," and therefore may not be litigated in the same United States Courts. *Miccosukee Tribe of Indians of Florida v. Kraus-Anderson Construction Co.*, 607 F.3d 1268, 1275 (11th Cir. 2010). The United States acknowledges these holdings, and even admits that the *Wilson* court "concluded that federal law provide[s] the relevant rule of recognition in federal court," while the Eleventh Circuit in this case concluded just the opposite. USA Br. at 18. Yet, the United States takes the position that no circuit conflict exists because "*Wilson* did not address the applicability of Section 1331[.]" *Id.*

The United States' view is tantamount to saying that it is an open question in the Ninth Circuit as to whether federal subject matter jurisdiction exists in a lawsuit to enforce a tribal court judgment. But that is not so. In *Wilson*, the Ninth Circuit foreclosed the matter when it concluded that "the ultimate decision governing the recognition and enforcement of a tribal judgment by the United States [is] founded on federal law." 127 F.3d at 813.

Therefore, district courts in the Ninth Circuit are not free to follow the Eleventh Circuit's decision in this case to the exclusion of *Wilson*, and cannot hold that there is no federal subject matter jurisdiction for tribal judgment enforcement cases. In the Eleventh Circuit, no district court could follow *Wilson* and permit such cases to go forward on federal question jurisdiction.[1] Accordingly, the conflict between *Wilson* and the Eleventh Circuit's decision is plain.[2]

Moreover, an implicit conflict may well deserve certiorari review, *cf. Ford Motor Credit Co. v. Milhollin*, 444 U.S. 555, 559 (1980) (certiorari granted where conflict was "[i]mplicit in the conclusion of the Court of Appeals"); *Nat'l Ass'n of Greeting Card Publishers v. U.S.P.S.*, 462 U.S. 810, 820 (1983) (certiorari granted to resolve "inconsistencies" in Circuit Court decisions), especially

---

1. That the district court in this case *did* follow *Wilson* when it determined the Tribe's enforcement action presented a federal question under section 1331 highlights another reason that conflict review is appropriate here. This Court has granted certiorari in prior cases in order "to resolve the conflict between [the Court of Appeals'] holding and the prior decisions of federal courts upon which the District Court had relied." *See Fleischmann Distilling Corp. v. Maier Brewing Co.*, 386 U.S. 714, 716-17 (1967).

2. Although the United States argues that there is no conflict between the Eleventh Circuit's decision and *MacArthur v. San Juan County*, 497 F.3d 1057 (10th Cir. 2007), it admits the Tenth Circuit affirmed the district court's conclusion that a tribal court recognition claim "aris[es] under federal law because it turns on substantial questions of federal law." USA Br. at 13-14 (quoting *MacArthur v. San Juan County*, 391 F. Supp. 2d 895, 987 (D. Utah 2005), and noting that the district court was affirmed in relevant part on this issue).

where, as here, the conflict concerns an important and threshold inquiry of federal subject matter jurisdiction, *see, e.g., Ruhrgas AG v. Marathon Oil Co.*, 526 U.S. 574, 582-83 (1999) (certiorari granted to resolve conflict between circuits on jurisdictional issue); *United States v. Cal. E. Line*, 348 U.S. 351, 353 (1955) (where circuits had construed provision "differently," certiorari granted to address jurisdictional question upon which the Court had never passed).

The United States also contends that the geographic disparity problem resulting from the circuit conflict, *see* Tribe's Pet. at 17-20; Kraus-Anderson's Resp. at 4-5, is insignificant because "it appears that state courts within the Ninth Circuit still hold themselves open for enforcement of tribal court judgments under state law, and have not read *Wilson* to establish a federal standard that preempts the application of state recognition law." USA Br. at 21.

The Tribe does not contend that *Wilson* has displaced the jurisdiction of state courts to hear tribal judgment enforcement actions. Rather, its geographic disparity argument posits that the circuit conflict has permitted Indian tribes in the West an option not afforded in the Eleventh Circuit to seek recognition of their judgments in federal court instead of state court, if they so choose or if their State's laws foreclose enforcement. *See* Tribe's Pet. at 10-12 (arguing that "tribes in different parts of the country have different rights when it comes to enforcing their judgments and obtaining federal recognition of those judgments by the United States"). Such an option is imperative to the unique relationship between the United States and Indian tribes as domestic sovereigns

that pre-date the Union, and it recognizes that in light of such relationship any enforcement action must be decided by reference to the federal common law and the uniquely federal character of Indian law in this Country.[3]

The jurisdictional disparity between East and West has real consequences for Indian tribes. Indeed, contrary to the United States' argument that only three reported cases have exercised federal jurisdiction over an action seeking to recognize a tribal court judgment, *see* USA Br. at 16, federal courts have not infrequently exercised jurisdiction in such cases. *See, e.g.*, *Reed v. Helena Abstract & Title Co.*, 200 F. App'x 641, 642 (9th Cir. 2006); *Bird v. Glacier Elec. Coop., Inc.*, 255 F.3d 1136, 1140 (9th Cir. 2001); *Citizens Savings Bank & Trust Co. v. Wellman*, 2010 WL 2710414, at *1 (D. Mont. July 6, 2010); *Vacco v. Harrah's Operating Co., Inc.*, 661 F. Supp. 2d 186, 189 (N.D.N.Y. 2009); *Bank of Am., N.A. v. Bills*, 2008 WL 682399, at *5-*6 (D. Nev. Mar. 6, 2008), *aff'd* 400 F. App'x 159 (9th Cir. 2010).

---

3. The states have enacted a patchwork of approaches to the recognition of Indian judgments, with some states treating tribal judgments like foreign judgments and others employing Indian-judgment-specific statutes. *See and compare* State Laws, USA Br. at App. 1a-3a. Still others have no statutory provisions to recognize such judgments, but appear to have developed rules of recognition through case law. *See id.* at App. 3a-5a. This backdrop supports the Tribe's argument that Indians, if they so choose, should be permitted to seek enforcement under the federal common law in a uniform manner in the courts of the United States, without regard to the circuit in which they reside or in which a particular dispute arises.

II. The United States Is Incorrect That No Conflict Exists Between The Eleventh Circuit's Opinion And Supreme Court Precedent

The question presented by the Tribe in this case is whether a federal court has subject matter jurisdiction to recognize and enforce the Miccosukee Tribal Court's judgment resolving a contractual dispute between the Tribe and a non-Indian company. In its Petition, the Tribe demonstrates that the Eleventh Circuit's ruling that the court lacked federal question jurisdiction conflicts with Supreme Court precedent. *See* Tribe's Pet. at 12-16. As explained in the Tribe's Petition, the Eleventh Circuit's opinion conflicts with this Court's decision in *National Farmers Union Insurance Companies v. Crow Tribe of Indians*, 471 U.S. 845, 851 (1985), which holds that a federal court has section 1331 jurisdiction to determine the scope of a tribal court's adjudicative authority. *See id.* at 852-53.

The United States recommends that this Court deny the Tribe's Petition based on the United States' assessment of the merits of the Tribe's jurisdictional argument. *See* USA Br. at 7. The United States argues that the federal question in *National Farmers* is not present here because *National Farmers* involved the tribal court's authority to enter a judgment whereas this case involves its ability to enforce its judgment, and that there is no federal question here at all because the Tribe "does not contend that the tribal court was exercising some power granted by federal law." *See* USA Br. at 11-12. The United States is incorrect. As shown herein and in the Tribe's Petition, a claim for recognition and enforcement of a tribal court judgment arises under federal law.

First, the question regarding a tribal court's power (or jurisdiction) to enter a judgment raises the same federal question as that regarding the tribal court's ability to enforce that judgment. The United States admits that under *National Farmers*, a petitioner's claim to *invalidate* a tribal court judgment raises a federal question. USA Br. at 13. Yet the United States wrongly denies that a claim to *recognize* a tribal court judgment presents essentially the other side of the same federal question, and thus also gives rise to federal jurisdiction under *National Farmers*. *Id.*

The United States' distinguishing of *National Farmers* fails because resolution of the enforcement issue in this case will either support or limit the Tribal Court's power to adjudicate; it will either support or limit that same aspect of the Tribe's sovereignty which was at issue in *National Farmers*. Although the Eleventh Circuit and Supreme Court cases are obviously not identical, the United States is wrong to argue that the question regarding enforcement in this case is distinguishable in any meaningful way, relevant to section 1331 jurisdiction, from the question considered in *National Farmers* regarding a tribal court's adjudicative authority. The law has long recognized a court's power to enforce its own orders as a fundamental aspect of its power to adjudicate. *See Citronelle-Mobile Gathering, Inc. v. Watkins*, 943 F.2d 1297, 1301 (11th Cir. 1991) (citing *Shillitani v. United States*, 384 U.S. 364 (1966)). *National Farmers* holds that a question regarding the scope of a tribal court's authority to adjudicate matters is a federal question under section 1331. *See* Tribe's Pet. at 12-16. This case raises the same federal question because the scope of the Miccosukee Tribal Court's power to enforce its orders necessarily implicates its authority to effectively adjudicate matters before it.

Second, a federal court's refusal to recognize a tribal court judgment clearly limits that tribe's sovereignty, and in so doing, raises a federal question.[4] *National Farmers* held that a question regarding whether federal law had divested the Tribe of the aspect of sovereignty necessary to adjudicate the dispute before the tribal court presents a federal question. *See* USA Br. at 12 (citing *National Farmers*, 471 U.S. at 852-53). Similarly, here, the question presented asks whether federal law allows the divestiture of the aspect of sovereignty necessary to enforce the Tribal Court's judgment.

Failure to enforce the Tribal Court's judgment limits tribal sovereignty without clear indication by Congress and is therefore inconsistent with federal Indian law and with Congressional policy regarding Indian tribes. *See* Tribe's Pet. at 15-20; *see also Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130, 140 (1982) ("Indian tribes. . . . 'are unique aggregations possessing attributes of sovereignty over both their members and their territory.'") (citation omitted); *NLRB v. Pueblo of San Juan*, 30 F. Supp. 2d 1348, 1352 (D.N.M. 1998) (tribal sovereignty can be abridged only by clear indication "in the language or legislative history of a statute, or by federal preemption of the entire subject area"); *NLRB v. Pueblo of San Juan*, 276 F.3d 1186, 1192 (10th Cir. 2001) (tribes retain their existing sovereign power until Congress acts by withdrawing them expressly).

---

4. That state courts may or may not provide a forum for the enforcement of tribal court judgments does not alter the analysis. *Compare infra* argument at 9-11; and *supra* at 4 n. 3 *with* USA Br. at 7-10, 15-16.

Without federal recognition and consistent federal enforcement of tribal court judgments, tribes' inherent sovereignty, exercised through tribal courts, is not guaranteed; it is subject to variations in state law and in the laws of the federal circuits. Thus, the Tribe's challenge to the Eleventh Circuit's jurisdictional holding raises a clear federal question under *National Farmers*, which recognizes that matters affecting tribal sovereignty arise under federal law. *See National Farmers*, 471 U.S. at 852-53.

The Eleventh Circuit's ruling that the district court lacked section 1331 jurisdiction to review the Tribe's claim conflicts with *National Farmers* because *National Farmers* concludes that federal courts have jurisdiction to determine "questions concerning the extent to which Indian tribes have retained the power to regulate the affairs of non-Indians." *Id.* at 851. The petitioners in *National Farmers* asserted "a right to be protected against an unlawful exercise of Tribal Court judicial power." *Id.* This Court held that such a claim arose under "federal law because federal law defines the outer boundaries of an Indian tribe's power over non-Indians." *Id.*; *see also* Tribe's Pet. at 14 (citing *id.*). The Tribe's claim for enforcement of the Tribal Court's judgment against a non-Indian in this case raises the same federal question.

The United States argues that the Tribe's reliance on *National Farmers* "mistakenly conflates Indian Tribes' inherent sovereignty with the federal laws that have circumscribed that power." USA Br. at 11. The interrelationship between the Tribe's inherent sovereignty and the federal law that circumscribes that power is no mistake, and it supports the exercise of federal jurisdiction in this case. Although the United States

correctly recognizes that Indian tribes possess inherent sovereignty, *see id.* at 11, the United States mistakenly suggests that tribal sovereignty is similar to that of either foreign nations or States of the Union with respect to the applicability of section 1331 to a tribal enforcement action. *See, e.g., id.* at 8-11.

Tribes have a unique relationship with the federal government as dual sovereigns. *NLRB*, 30 F. Supp. 2d at 1354; *see also Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1, 9 (1831). However, unlike the inherent rights which are affirmed, for instance, in the United States Constitution and other foundational documents, tribal sovereignty is meaningful only through application of federal Indian law doctrines, federal congressional policy regarding tribal self-governance and federal-tribal relations which have affirmed it. *See* USA Br. at 1-2 (citing the federal government's "'longstanding policy of encouraging tribal self-government,' including through the 'vital role' played by tribal courts").

Without such federal affirmation, tribal sovereignty is a theoretical concept with no real application. *See* 34 U.S. Op. Atty. Gen. 439, 442 (The boundaries of the trust relationship between Indian tribes and the federal government "rests entirely with Congress."). In contrast, a state's sovereignty is recognized and defined by the Constitution and Constitutional law. *See, e.g.*, U.S. Const. Amends. X, XI. Thus, the question in *National Farmers* regarding the tribal court's power to enter a judgment, *see* USA Br. at 12, is the same federal question presented here. Without a guaranteed federal forum to enforce its actions, the Tribal Court's power to adjudicate its orders is also not guaranteed.

Furthermore, failure to exercise federal jurisdiction in this case leaves this aspect of tribal sovereignty subject to the will of the states, which do not have the same trust relationship with tribes as the federal government, and which are not committed to promoting tribal self-sufficiency. Indian tribes are not states, and they are not foreign nations, as Respondent contends and as the United States appears to accept. *See* USA Br. at 8-9. They are federally recognized dual sovereigns. *See Cherokee Nation*, 30 U.S. at 2 ("[T]he relation of the Indians to the United States is marked by peculiar and cardinal distinctions which exist nowhere else."). As recognized in *National Farmers*, a tribal court's power to adjudicate, which is an aspect of its sovereignty, falls squarely within section 1331. The question presented here regarding the Tribal Court's power to enforce its own orders, is no different.[5]

Federal law applies directly to the Tribe's claim for federal recognition and enforcement of the Tribal Court's judgment, and not just to Respondent's defense, as argued by the United States. *See* USA Br. at 12-16. The United States takes too narrow a view of the Tribe's citation of

---

5. The United States, moreover, cites no support for the proposition that the federal-state balance requires that tribal court judgments be enforced only in a state forum, or that Congress intended for states to exercise exclusive jurisdiction over the issue of whether to enforce a tribal court judgment against a non-Indian. In fact, as shown herein, congressional policy favors federal jurisdiction in this case. That states have sometimes, or often, enforced tribal court judgments has no bearing on the federal jurisdictional question decided by the Eleventh Circuit, or on whether the Eleventh Circuit's decision regarding the application of section 1331 conflicts with *National Farmers*.

Grable & Sons Metal Prods., Inc. v. Darue Engineering & Manufacturing, 545 U.S. 308, 312 (2005), which simply shows that, as a matter of policy, where substantial federal interests are involved in a cause of action, it should be dealt with in federal court. *See* Tribe's Pet. at 17-18 (citing *Grable & Sons*, 545 at 312 ("this Court ha[s] recognized for nearly 100 years that in certain cases federal-question jurisdiction will lie over state-law claims that implicate significant federal issues")). As noted in the Tribe's Petition, *Grable & Sons* recognizes "the commonsense notion that a federal court ought to be able to hear claims recognized under state law that nonetheless turn on substantial questions of federal law." *Id.* The significant federal question here is that of federal recognition and enforcement of the Tribal Court's judgment, which implicates the Tribe's sovereignty and the Tribal Court's power to adjudicate matters before it. In advocating denial of certiorari, the United States overlooks this fact, and the others raised herein.

CONCLUSION

The United States is incorrect that certiorari is not warranted in this case. The Court should grant the Tribe's petition and issue a writ of certiorari to the United States Court of Appeals for the Eleventh Circuit to review its decision.

Respectfully submitted,

SONIA ESCOBIO O'DONNELL
Counsel of Record
JAMES EDWIN KIRTLEY, JR.
LARA O'DONNELL GRILLO
JORDEN BURT LLP
777 Brickell Avenue
Suite 500
Miami, Florida 33131
(305) 371-2600
seo@jordenusa.com

Counsel for the Petitioner
Miccosukee Tribe of Indians

May 2011